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No.

In The

Supreme Court of the United States

OCTOBER TERM, 1995

Toni Darlene Kimpel,

Petitioner,

v.

State of Alabama,

Respondent.

On Writ of Certiorari to the
Alabama Court of Criminal Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. WHETHER A WOMAN POSSESSES A FUNDAMENTAL CONSTITUTIONAL RIGHT UNDER THE NINTH AND FOURTEENTH AMENDMENTS TO EMPLOY A TRADITIONAL DIRECT-ENTRY MIDWIFE TO ASSIST WITH A PLANNED "HOME BIRTH."

II. WHETHER THE ALABAMA STATUTORY SCHEME WHICH PROHIBITS BOTH THE PRACTICE OF TRADITIONAL DIRECT-ENTRY MIDWIFERY AND "HOME BIRTH" VIOLATES A WOMAN'S RIGHT TO CHOOSE THE MANNER AND LOCATION OF HER CHILD'S BIRTH.

PARTIES TO THE PROCEEDING

The names of all parties to this proceeding appear on the cover.

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OPINIONS BELOW

The opinion of the Circuit Court of Mobile County, declaring the Alabama statutory scheme unconstitutional is not reported, but is attached hereto as Appendix C.

The opinion of The Alabama Court of Criminal Appeals is not yet reported but is attached hereto as Appendix D.

JURISDICTION

The Alabama Court of Criminal Appeals issued an opinion denying petitioners' constitutional claims on March 3, 1995. (Appendix D). A timely Petition for Certiorari to the Supreme Court of Alabama was filed by petitioner on April 27, 1995. On June 30, 1995, the Supreme Court of Alabama denied petitioners' Petition for Writ of Certiorari, a copy of which is attached hereto as Appendix E. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

> " . . . No state shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; . . . "

United States Constitution, Amendment XIV, Section 1.

* * * * *

> "The enumeration in the constitution of certain rights, shall not be construed to deny or disparage others retained by the people."

United States Constitution, Amendment IX.

* * * * *

> (a) It shall be unlawful for any person other than a licensed professional nurse who has received a license from the State Board of Nursing and the Board of Medical Examiners to practice nurse midwifery in this state. Any person violating this sub-section shall be guilty of a misdemeanor.

> (b) Nothing in sub-section (a) of this section shall be construed as to prevent lay midwives holding valid health department permits from engaging in the practice of lay midwifery as heretofore provided until such time as said permit may be revoked by the County Board of Health.

Code of Alabama, § 34-19-3 (1975).

* * * * *

> It shall be unlawful for any person holding a license as a nurse midwife to attend any cases except cases of normal childbirth, as defined in § 34-19-2, or to perform manipulations of any kind. In all cases in which the child is not delivered spontaneously within a reasonable time, the nurse midwife shall notify a qualified physician immediately and make no effort to deliver the child except under the authorization and supervision of such physician.
>
> All deliveries must be planned to take place in the hospital.

Code of Alabama, § 34-19-8 (1975).

STATEMENT OF THE CASE

On August 23, 1976, the Alabama legislature passed Ala.Code § 34-19-1 *et seq.* (Appendix F). By its terms, the said statutory provision restricted the practice of midwifery to licensed professional nurses, Ala.Code § 34-19-3(a), and required that "All deliveries must be planned to take place in the hospital." Ala.Code § 34-19-8. Prior to the passage of the above legislation, midwifery in Alabama was regulated by Title 46 § 168 of the Code of Alabama 1945. Title 46 § 168 required midwives to hold permits from a County Health Department but con-

tained no restrictions as to who could be a midwife or where births were to occur. A copy of Title 46 § 168 is attached hereto as Appendix G.

Although Title 46 § 168 was expressly repealed by Alabama Code § 34-19-1, the new statutory scheme contained a provision that appeared to retain the former practice of direct-entry and/or lay midwifery. Specifically, Ala.Code § 34-19-3(b) provides:

> (b) Nothing in . . . this section shall be construed as to prevent lay midwives holding valid Health Department permits from engaging in the practice of lay midwifery as heretofore provided until such time as said permit may be revoked by the County Board of Health.

On or about November 23, 1992, petitioner was charged in separate indictments with five counts of practicing nurse midwifery without a license in violation of Alabama Code § 34-19-3(a). Petitioner was also charged with one count of manslaughter resulting from a stillborn birth due to no fault of the petitioner. Subsequently, the manslaughter charge was withdrawn.

Thereafter, On January 29, 1993, petitioner filed a Motion to Dismiss the remaining indictments alleging that the statutory scheme regulating nurse midwifery was not applicable to her in that she was engaged in the practice of lay midwifery, not nurse midwifery, and further, that the statute, constitutionally, could not be construed to prohibit direct-entry and/or lay midwifery in that the right to employ a traditional direct-entry midwife to assist with a planned home birth was within the constitutional rights of privacy and equal protection under the Ninth and Fourteenth Amendments of the United States Constitution. (Appendix A).

On March 12, 1993, defendant's Motion to Dismiss was denied. (CR2).

On April 28, 1994, petitioner's Motion to Dismiss was refiled. (Appendix B). At a hearing on said motion, it was stipulated and agreed that Petitioner was a direct-entry/lay midwife; that she was not a nurse and had never held herself out to be a certified nurse midwife; that she did not have a license to practice nurse midwifery nor a permit to practice lay midwifery, although she applied for a lay midwifery permit and was told that such permits were no longer issued. (C.R. 26-27) Following the hearing, petitioner's Motion to Dismiss was granted. (Appendix C).

Thereafter, the State of Alabama filed a notice of appeal to the Alabama Court of Criminal Appeals alleging that the Circuit Court of Mobile County had found the Alabama statute to be unconstitutional. (C.R. 109-110). On March 3, 1995, the Alabama Court of Criminal Appeals reversed the decision of the Circuit Court of Mobile County holding as follows:

> (1) that the Alabama statutory scheme abolished the practice of lay midwifery and established nurse midwifery as the only form of legal midwifery allowable in the State of Alabama; (Ct. opinion at p. 6-7)
>
> (2) that the statutory provision providing for the continued practice of lay midwifery was merely a grandfather clause and that all who previously practiced under such clause had terminated their practice; (Ct. opinion at p. 7 n.3)
>
> (3) that the right to privacy does not extend to choosing the manner of childbirth, specifically midwifery; (Ct. opinion at p. 7) and,
>
> (4) that the Alabama statute regulating the practice of midwifery does not involve a suspect class and therefore does not violate the equal protection clause of the Federal Constitution. (Ct. opinion at p. 8)

In assessing the privacy and equal protection issues, the Court of Criminal Appeals applied a rational basis test. (Ct. opinion at p. 7-8)

Thereafter, petitioner filed a timely Petition for Writ of Certiorari to the Supreme Court of Alabama which was denied on June 30, 1995. (Appendix E).

REASONS FOR GRANTING THE WRIT

In *Planned Parenthood v. Casey*, ___U.S.___, 112 S.Ct. 2791 (1992), this Court recognized that the fundamental right created in *Roe* extends to a woman's decision to give birth, not just her decision to terminate her pregnancy. 112 S.Ct. at 2811. This principle had been implicit in prior cases stating or holding that fundamental privacy and/or liberty rights extended to the subjects of childbirth, procreation, and child rearing. Petitioner contends that the birth decision presumes and includes the fundamental right to employ a traditional, or direct-entry, midwife to assist with a planned home birth. Petitioner does not claim that the state lacks authority to regulate midwifery or home birth; Only that any such regulations may not abolish such rights nor unduly restrict them as in the instant case. Given the holding of the Alabama court it is essential that this Court hear this case in order to clarify its holding in *Casey* and prior privacy/substantive due process cases as it relates to the scope of the Woman's right to choose birth. Such a clarification is especially essential in light of the Alabama court's apparent belief that the viability and/or trimester approach established in *Roe* (and modified in *Casey)* allows them to apply the rational basis test to a prohibition of direct-entry midwifery and planned home birth. The Alabama Court has confounded "weight" and "fit" in a manner quite destructive of fundamental privacy and/or liberty rights by its

erroneous presumption that the existence of a compelling state interest allows them to apply the rational basis test. Such an approach ignores the crucial role of "fit" analysis to fundamental privacy and liberty rights. Petitioner concedes that the State possesses a compelling interest in the life and health of women, unborn children, and infants; Petitioner contends, however, that a prohibition of direct-entry midwifery and of planned home birth must be constitutionally evaluated under the "narrowly-tailored" branch of strict scrutiny. Under this test, the State should be required to prove that its deprivation of a fundamental liberty or privacy right is narrowly-tailored to effectuate the compelling state interests in question. It is important that this Court reassert the constitutional principle that wholesale deprivations of fundamental privacy or liberty rights must be evaluated under the "narrowly-tailored" test regardless of the stage of development, born or unborn, of the child or adult whom the state seeks to protect. Absent action by this Court, women and families in Alabama will continue to be subject to wholesale deprivations of their fundamental privacy or liberty rights whenever the State is able to claim that it acts in service of a "compelling interest", regardless of how unrelated such compelling interest really is to the deprivation of the right.

I. THE ALABAMA COURT OF CRIMINAL APPEALS ERRONEOUSLY HELD THAT THE ALABAMA MIDWIFERY STATUTE, WHICH RESTRICTS THE PRACTICE OF MIDWIFERY TO LICENSED REGISTERED NURSES AND REQUIRES THAT ALL BIRTHS BE "PLANNED HOSPITAL BIRTHS", DOES NOT VIOLATE A WOMAN'S RIGHT TO A PLANNED MIDWIFE ASSISTED HOME BIRTH GUARANTEED BY THE NINTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

A. THE LIBERTY TO EMPLOY A MIDWIFE TO ASSIST A HOME-BIRTH IS AT THE CORE OF THE SUBJECT AREA OF THE CONSTITUTIONAL RIGHT OF PRIVACY.

The Constitutional Right of Privacy has frequently been described by the Court in terms of subject area. Thus, the Court describes the right of privacy as relating to marriage, procreation, family relationships, childbirth, and child rearing. *See, e.g., Zablocki v. Redhail*, 434 U.S. 374, 386 (1978). Choices regarding childbirth, including where one's child will be born and who will deliver one's child, are among the first child rearing decisions that parents make, *see*, Comment, *Childbearing and Nurse Midwives: A Woman's Right to Choose*, 58 N.Y.U. L. Rev. 661, 689 (1983). Such decisions are by no means trivial and can have profound affects on all aspects of family relations, including marital, sibling, and parent-child relationships. Success and experience of childbirth can have profound impact on the individual woman in particular, and family relationships in general. "Researchers have found that high-tech birth often leads to loss of self-esteem because it makes women feel that they have lost control over the most fundamental aspects of self. . . . Interventions in birth can lead to depression and difficulty

in adjusting to motherhood." Richard Wertz & Dorothy C. Wertz, *Lying-In, A History of Childbirth in America* 256 (expanded ed. 1989). Because direct-entry midwives and allelopathic physicians employ competing and contrasting approaches to childbirth, the choice to utilize the services of a midwife is more than a simple choice between birth attendants: It is a choice of philosophies with regard to one of the most intimate and personal matters that an individual woman and family face. Given the scope and magnitude of the childbirth decision, if childbirth is not within the subject area of the right of privacy, it is hard to see what else would be.

B. THE LIBERTY TO EMPLOY A MIDWIFE IS DEEPLY ROOTED IN AMERICAN HISTORY AND TRADITION.

In addition to subject area, this Court has repeatedly relied upon historical analysis to determine whether a claimed liberty, which is not enumerated in the text of the Constitution, is a fundamental right. Specifically, the Court has described as fundamental rights "those liberties that are 'deeply rooted in this Nation's history and tradition.'" *Bowers v. Hardwick*, 478 U.S. 186, 192 (1986) (quoting *Moore v. East Cleveland*, 431 U.S. 494, 503 (1977) (plurality opinion by Justice Powell). Under this historical analysis, it is equally clear that mothers possess a fundamental right to employ midwives under the Ninth and Fourteenth Amendments to the United States Constitution.

During the colonial period, and at the time of the enactment of the Bill of Rights in 1791, the vast majority of American births occurred in the home with the assistance of midwives. Birth was generally viewed as a natural process and a frequent social event in the lives of women. *See*, Richard Wertz & Dorothy C. Wertz, *Lying-In, A History*

of Childbirth in America 1-26 (expanded ed. 1989). Midwifery was universally legal, although some minimal regulation of midwifery existed. *See*, J. Litoff, *American Midwives* 5 (1978). New York City's 1716 midwife ordinance, for example, forbade the midwife from assisting in abortion. *See*, Wertz & Wertz, *supra*, at 7. By 1750, physicians began the process of competing with traditional midwives. As late as 1791, however, because physicians were comparatively expensive and few in number, and because women commonly objected to the presence of male physicians during birth, most births were still midwife assisted. *See*, J. Litoff, *supra*, at 7-10; R. Wertz & D. Wertz, *supra*, at 29-44.

During the nineteenth century, physicians intensified their competition with midwives and largely succeeded in displacing them among the upper and middle classes. Nonetheless, even by 1900 midwives attended approximately half of all births in America. *See* J. Litoff, *supra*, at 27, 136. When the Fourteenth Amendment was passed in 1868, midwifery was universally legal and almost completely unregulated. There was extensive competition among various kinds of "physicians". Women possessed and exercised extensive choices among a variety of different birth assistants. And, nearly all births occurred at home. *See e.g.*, R. Wertz & D. Wertz, *supra*, at 133 (less than 5% of women delivered in hospital in 1900). Choices regarding the person(s) assisting childbirth and the place of childbirth were by practice, law, and custom a matter of individual and family choice from the colonial period until the early part of the twentieth century.

Although the twentieth century produced a growing and unwarranted suppression of traditional midwifery, Massachusetts was the only state in the early 1900s to outlaw midwifery, J. Litoff, *supra*, at 141. Other states began to regulate midwifery. *See, id.* at 139-41. Nonetheless, during the early twentieth century traditional lay mid-

wifery remained generally legal and relatively unregulated.

After 1900, the number of midwife-assisted births rapidly decreased, with approximately half of all births having been midwife assisted. By 1930, only 15% of births were midwife-assisted. *Id.* at 139. By 1973 less than 1% of all births were attended by either traditional or nurse midwives. *Id.* at 142. Although the numbers of women actually exercising the personal decision to employ a traditional lay midwife to assist with home birth has obviously declined, this in no way effects the fundamental nature nor historical tradition of such a choice. There exists, moreover, a statistically small but culturally significant movement of women and families interested in reclaiming America's heritage of direct-entry midwifery and home birth; the Constitution protects the right to reclaim such traditional practices.

C. THE STATUTORY PROHIBITIONS OF THE PRACTICE OF DIRECT-ENTRY MIDWIFERY AND HOME BIRTHS PLACE AN UNDUE AND DISPROPORTIONATE BURDEN ON WOMEN AND FAMILIES WITHOUT SUBSTANTIAL ECONOMIC MEANS.

In addition to being an expression of family autonomy and health, the decision to employ a direct-entry midwife to assist with a planned home birth is often economic and pragmatic. Those employing the services of a traditional midwife are, in many cases, of moderate or below moderate means, often without the means to afford adequate health care insurance, and yet not necessarily qualifying for sufficient governmental assistance. Given the spiralling costs of obstetric and hospital care, many individuals could not otherwise afford prenatal and ob-

stetrical care if it were not for the availability of practicing direct-entry midwives. Contrary to the opinion of the Alabama Court of Criminal Appeals, Petitioner contends that her clients compose a class of individuals as has been defined under our body of equal protection laws and that the Alabama statutory scheme, which prohibits the practice of direct-entry midwifery and compels women to give birth to children in hospitals to which they have no access, places an undue burden on the rights of her clients which is disproportionally impacted and which she vicariously asserts.

II. STATE PROHIBITION OF DIRECT-ENTRY MIDWIFERY CONSTITUTES AN INFRINGEMENT OF A FUNDAMENTAL RIGHT WHICH MUST BE REVIEWED UNDER STRICT SCRUTINY.

Because women and families have a fundamental constitutional right to employ a direct-entry midwife to assist with planned home births, any law, Contrary to the holding of the Alabama Court of Criminal Appeals, infringing upon that right must be examined under strict scrutiny. As this Court knows, the usual test for strict scrutiny in the area of privacy rights requires the state to demonstrate that its statute is narrowly tailored to effectuate a compelling state interest. *See, e.g., Roe v. Wade*, 410 U.S. 113,155 (1973); *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965).

A. ALABAMA CODE SECTION 34-19, *et.seq.*, PROHIBITING THE PRACTICE OF DIRECT-ENTRY MIDWIFERY AND HOME BIRTH IS NOT NARROWLY TAILORED TO EFFECTUATE THE STATE'S COMPELLING INTEREST IN THE LIFE AND HEALTH OF WOMEN, FETUSES, AND NEONATES.

Alabama Code Section 34-19, *et. seq.*, provides that all midwives must be licensed registered nurses and that all births must be planned hospital births. According to the Alabama Court of Criminal Appeals, such restrictions are valid because , " . . . the right to privacy does not extend to the manner of childbirth", and any rights the mother may have," are subjugated to the governmental interest in protecting hers and the child's safety." Court's opinion at page 7. In so finding the Alabama court applied a rational basis test. The court's decision with regard to the standard of review and the issue of safety is factually and legally flawed.

1. Home birth assisted by a direct-entry midwife is as safe, or safer, as physician assisted hospital birth.

Recent studies have demonstrated that home birth assisted by a qualified traditional midwife is safer, or as safe, as physician-assisted hospital birth. *See, e.g.*, Richard Wertz & Dorothy C. Wertz, *Lying-In, A History of Childbirth in America* 288-90 (expanded ed. 1989); J. Litoff, *American Midwives* 146-47 (1978); Adamson & Gare, *Home or Hospital Births?*, 243 J.A.M.A. 1732 (1980). The excellent statistical outcomes of midwife-assisted home births for both babies and mothers indicates that midwives are fully capable of determining when intervention or care by a physician is necessary to the health of mother or child and substantiates petitioner's claim that the prohibition of midwifery is not narrowly tailored to effectuate the state's

interests. In fact, these statistics demonstrate that the prohibition of direct-entry midwifery should fail even under a rational basis test, because the prohibition of direct-entry midwifery is not rationally related to the state's interests in maternal, fetal, and neonatal life and health.

2. *The Alabama statutory provision requiring all births to be "planned hospital births" unduly narrows a women's right to choose the manner and place of her child's birth and subjects her to unwarranted and unwanted medical procedures.*

The continuing successful use of midwife-assisted home birth explodes the myth that midwifery has been superseded by modern obstetrics. Unfortunately, modern obstetricians, like their predecessors of the nineteenth century, often employ unnecessary, dangerous, and counterproductive interventions. *See, e.g.*, Richard Wertz & Dorothy C. Wertz, *supra*, at 257-65. This phenomenon is best illustrated by America's astonishing Cesarean section rate of 24.4%, *see, Id.* at 260, apparently the highest in the world. An American woman "in the prime child bearing years between 20 and 24" has a 23 percent chance, or nearly one in four chance, of undergoing a Cesarean birth. *Id.* It is certainly reasonable and understandable that a contemporary healthy woman might desire to employ a midwife in order to avoid a hospital situation in which she will be subjected to numerous unnecessary and highly intrusive interventions, and a large chance of an unnecessary and serious surgical procedure. The denial of such a choice cannot be supported by reference to the state's compelling interests in her health, or the health of her child. Such a denial, moreover, compels the woman to submit herself and her child to highly intrusive invasions of their persons and bodies. The absence of an actual necessity for such forced submission to unwanted medical treatment must

render such restriction unconstitutional. *Cf., Cruzan v. Director, Missouri Dept. of Health*, 110 S.Ct. 2841, 2851 (1990) (all persons possess a liberty interest in refusing medical treatment).

Additionally, the statutory requirement that all deliveries be planned hospital deliveries unduly narrows the woman's access to qualified birth assistants. *Cf., Carey v. Population Services International*, 431 U.S. 684, 97 S.Ct. 2010 (1977). This is especially true in those rural Alabama counties in which medical obstetrical care at a local hospital is simply not available. It is wholly irrational to force women to choose between the invasive and unwanted treatment of medical obstetrics, and no care or treatment at all, when a better option — that of direct-entry midwifery — is available.

3. The restriction of the practice of midwifery to licensed registered nurses unduly limits access to midwifery services and home birth.

The American nurse midwife is a twentieth-century creation which "grew out of the midwife debate of the early years of the twentieth century." J. Litoff, *supra*, at 122, 142-43. Although defendant supports nurse midwifery as a legitimate and safe choice for pregnant women, nurse midwifery is clearly distinct from direct-entry (or traditional) midwifery, and should not constitutionally displace it. Nurse midwifery, whether practiced in a hospital or "birth center," is a distinct, medicalized profession, standing somewhere between physician-assisted hospital birth and traditional midwifery in the degree of reliance on interventionist procedures. *See*, R. Wertz & D. Wertz, *supra*, at 284-90; J. Litoff, *supra*, at 142-45. America's rich history of midwifery is essentially one of traditional, direct-entry midwifery. The development of American nurse midwifery should be viewed as a con-

tinuation, or reassertion, of the American tradition of choice in regard to persons assisting childbirth; it would be sad indeed if the relatively recent phenomenon of nurse midwifery instead was used to restrict the option of traditional midwifery which was universally available to American women from the colonial period through the start of the twentieth century.

It is particularly significant, within the context of this case, that nurse-midwives are forbidden from assisting planned home births in Alabama. Under these circumstances, it is particularly clear that nurse-midwifery is not an adequate substitute for direct-entry midwifery.

CONCLUSION

For the reasons stated herein, petitioner respectfully requests that this Honorable Court grant Petitioner's Writ of Certiorari and following consideration to reverse and render the decision of the Alabama Court of Criminal Appeals or in the alternative to remand this case with instructions to apply the appropriate standard of review.

Respectfully Submitted,

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